Chang Chor Heong & Anor v Puncak Kencana Sdn Bhd (Lim Kim Kee & Anor, third party)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22–382 OF 2006
AZMAN ABDULLAH JC
15 APRIL 2008

Civil Procedure — Specific performance — Agreement for sale of a parcel of multi storey building — Defective workmanship by developer — Whether developer bound by covenant to repair and rectify defects

Civil Procedure — Third party proceedings — Contribution from third party — Action for specific performance by plaintiff against developer — Whether developer's liability must be proved first — Whether third party proceedings by developer a triable issue — Rules of the High Court 1980 O 16

The defendant who was the developer of the Dataran Prima Condominium sold the apartment described as Parcel No P-PH-07 Storey No 21 at Building Block P to the plaintiffs vide a sale and purchase agreement ('SPA'). They agreed and covenanted to repair at their own cost any defects, shrinkages and other faults to the said apartment, the building or the common property during the defect liability period within thirty days upon receipt of a written notice. The defendant received from the plaintiffs several complaints of water leakage and seepage through the common property reinforced concrete roof slab into the said apartment and requiring them to, inter alia, repair and install adequate water proofing to the reinforced concrete roof slab so as to ensure that there was no water leakage or seepage to the said apartment. Despite the complaints, the defendant had failed to perform its obligations under the SPA, the deed of mutual covenants and the House Rules. The defendant admitted that the illegal extension and structure on the common property on the roof top had caused water leakage to the immediate unit below. They contended that the leakage was due to the floor punctures caused by drilling which in turn has resulted in water being retained by the pebbles and sipping into the slab through the bolts. The plaintiffs sought court order to compel the defendant to repair and make good the water proofing to the reinforced concrete roof top slab of the said building and to ensure that there was no water seepage or leakage from the roof into the plaintiffs' apartment. Further, that the defendant repairs, rectify and make good the defects and damage caused to the plaintiffs' apartment unit by the water seepage or the

leakage from the roof level. The defendant had filed third party proceedings against the residents of the adjoining apartment.

Held, allowing the plaintiffs' application with costs:

(1) Clause 30(1) of the SPA clearly showed that the defendant covenanted and agreed with the plaintiffs that any defects, shrinkage or other faults in the said apartment or in the building or in the common property shall be repaired and made good by the defendant at its own costs and expense within thirty days of the defendant receiving a written notice from the plaintiffs. Therefore the defendant was ordered to make good the water proofing and repair and rectify the damages caused to the plaintiffs' apartment (see para 18).

(2) The third party proceedings brought by the defendant was not a triable issue. It is settled law that the defendant's liability towards the plaintiffs need to be proven first by the court. Order 16 of the Rules of the High Court 1980 provides the guidelines for third party proceedings. Further, the Supreme Court had, in *Mat Abu bin Man v Medical Superintendent, General Hospital Taiping, Perak & Ors* [1989] 1 MLJ 226 and the Federal Court, in *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657, enunciated the principles governing third party proceedings namely, that their contribution should be regarded as independent and separate from proceedings by a plaintiff against a defendant (see paras 17 & 22).

[Bahasa Malaysia summary

Defendan yang merupakan pemaju Kondominium Dataran Prima menjual pangsapuri yang dikenali sebagai Parcel No P-Ph-07 Tingkat No 21 di Blok Bangunan P kepada plaintif-plaintif melalui satu perjanjian jual beli ('PJB'). Mereka bersetuju dan berjanji untuk membaiki atas kos mereka sendiri, sebarang kerosakan, penyusutan dan lain-lain kerosakan kepada pangsapuri tersebut, bangunan dan milikan bersama semasa tempoh liabiliti kerosakan dalam masa tiga puluh hari dari tarikh penerimaan notis bertulis. Defendan menerima daripada plaintif-plaintif beberapa aduan mengenai kebocoran air dan peresapan melalui milikan bersama bidur bumbung konkrit yang diperteguh di dalam pangsapuri tersebut dan meminta mereka untuk, antara lain, membaiki dan memasang pengalis air yang secukupnya kepada bidur bumbung konkrit yang diperteguh untuk memastikan tiada kebocoran air atau peresapan ke dalam pangsapuri tersebut. Walaupun menerima aduan, defendan gagal untuk melaksanakan kewajipannya di bawah PJB tersebut, surat ikatan perjanjian bersama dan Peraturan-Peraturan Perumahan. Defendan mengaku bahawa binaan tambahan dan struktur yang tidak sah

kepada milikan bersama di atas bumbung telah mengakibatkan kebocoran air kepada unit yang di bawahnya. Mereka menghujah bahawa kebocoran adalah disebabkan oleh kebocoran yang disebabkan oleh penggerudian yang telah menyebabkan air bertakung di antara kerakal dan meresap ke dalam bidur melalui bolt. Plaintif-plaintif memohon perintah mahkamah untuk mendesak defendan membaiki dan membetulkan pengalis air kepada bidur bumbung konkrit yang diperteguh bangunan tersebut dan untuk memastikan bahawa tidak terdapat peresapan air atau kebocoran dari bumbung ke pangsapuri plaintif-plaintif. Selanjutnya, bahawa defendan membaiki dan membetulkan kerosakan-kerosakan yang terjadi kepada unit pangsapuri plaintif-plaintif akibat peresapan air atau kebocoran dari bumbung. Defendan memfailkan prosiding pihak ketiga terhadap penghuni-penghuni pangsapuri yang bersebelahan.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Klausa 30(1) PJB jelas menunjukkan bahawa defendan berjanji dan bersetuju dengan plaintif-plaintif bahawa apa-apa kerosakan, penyusutan dan lain-lain kerosakan kepada pangsapuri tersebut, bangunan dan milikan bersama akan dibaiki dan diperbetulkan oleh defendan atas kosnya sendiri dalam tempoh tiga puluh hari dari tarikh defendan menerima notis bertulis daripada plaintif-plaintif. Oleh itu defendan diperintahkan untuk membetulkan pengalis air dan membaiki dan membetulkan kerosakan yang diakibatkan kepada pangsapuri plaintif-plaintif (lihat perenggan 18).

(2) Prosiding pihak ketiga yang dibawa oleh defendan bukan isu yang boleh dibicarakan. Ia adalah undang-undang mantap bahawa liabiliti defendan terhadap plaintif-plaintif mesti dibuktikan terlebih dahulu oleh mahkamah. A 16 Kaedah-Kaedah Mahkamah Tinggi 1980 memperuntukkan garis panduan untuk prosiding pihak ketiga. Selanjutnya, Mahkamah Agung telah di dalam kes *Mat Abu bin Man v Medical Superintendent, General Hospital Taiping, Perak & Ors* [1989] 1 MLJ 226 dan Mahkamah Persekutuan di dalam kes *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657 menjelaskan prinsip-prinsip yang mentadbir prosiding pihak ketiga iaitu bahawa sumbangan mereka perlu dianggap sebagai tersendiri dan berasingan daripada prosiding oleh plaintif terhadap defendan (lihat perenggan 17 & 22).]

Notes

For a case on agreement for sale of a parcel of multi storey building, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) para 6374.

For a case on contribution from third party, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) para 7691.

Cases referred to

Mat Abu bin Man v Medical Superintendent, General Hospital Taiping, Perak & Ors [1989] 1 MLJ 226 (folld)

United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657 (folld)

Legislation referred to

Housing Development (Control and Licensing) Act 1966 Schedule H
Rules of the High Court 1980 O 16, O 81

WH Tang (Tan Ming Hong with him) (Arifin & Partners) for the plaintiffs. K Kulasekar (Ranjit Ooi & Robert Low) for the defendant.

Azman bin Abdullah JC:

INTRODUCTION

[1] This is the plaintiff's application by way of summons in chambers (encl 4) for an order of specific performance under O 81 of the Rules of the High Court 1980 with regard to the sale and purchase agreement and the deed of mutual covenants between the plaintiff and the defendant both dated 15 April 2004 respectively and House Rules.

BACKGROUND

[2] The facts not in dispute herein are as follows. The defendant is the registered and beneficial owner of the land held under HS(D) 135922 Lot 42407 Pekan Cempaka District of Petaling State of Selangor ('land').

[3] At material times, the defendant is the developer of the condominium known as Dataran Prima Condominium ('condominium'). The defendant sold to the plaintiffs the apartment described as Parcel No P-PH-07 Storey No 21 at Building Block P ('apartment') vide the sale and purchase agreement dated 15 April 2004.

[4] The above said sale and purchase agreement entered by the defendant is in the standard form prescribed by Schedule H of the Housing Development (Control and Licensing) Act 1966 and the reg 11(1).

[5] The defendant agreed and covenanted to construct the said apartment together with the common property in a good and workmanlike manner in

A accordance with the description set out in the Fourth Schedule to the sale and purchase agreement, an in accordance with the plans approved by the relevant authority.

B **[6]** The defendant agreed and covenanted to repair and make good at its own costs and expense within 30 days of receipt of a written notice any defects, shrinkages and other faults to the said apartment, the building or the common property which shall become apparent within a period of eighteen months (the defects liability period) after the date the plaintiff took vacant C possession of the said apartment which are due to defective workmanship or materials or the apartment or the building or the common property not having been constructed in accordance with the approved building plans or the specifications.

D **[7]** The defendant agreed and covenanted, upon payment of service charges by the plaintiff, to maintain and manage the common property. The plaintiff paid the service charges to the defendant as and when the same becomes due and payable.

E **[8]** The defendant delivered vacant possession of the said apartment to the plaintiff on 14 July 2005. Any defects to the said apartment, the building or the common property that shall become apparent after 31 January 2007 shall be outside the defects liability period.

F **[9]** The defendant received a notice in a letter dated 13 March 2006 within the defects liability period from the plaintiffs that there is water leakage and seepage through the common property reinforced concrete roof slab into the said apartment and requiring the defendant to, inter alia, repair and install G adequate water proofing to the reinforced concrete roof slab to ensure that there is no water leakage or seepage to the said apartment.

[10] The defendant agreed, inter alia, to check the waterproof membrane of the common property reinforced concrete roof slab and if the same is H damaged to repair the waterproof membrane on the common property reinforced concrete roof slab. The reinforced concrete roof slab is common property and part of the external structure of the building.

I **[11]** The defendant admitted in their letter dated 22 September 2006 to Messrs KK Lim & Associates that the illegal extension on the roof top had caused water leakages to the immediate unit below and their engineering specialist verified that the leakages were directly due to floor punctures caused by drilling which in turn has resulted in water being retained by the pebbles and sipping into the slab through the bolts.

[12] The defendant failed to and refused to repair and make good the defects as the reinforced concrete slab is common property and part of the external structure of the building.

[13] The illegal extension and structure on the common property reinforced concrete roof slab have not been removed. The floor punctures caused by drilling which in turn has resulted in water being retained by the pebbles and sipping into the slab through the bolts are also not removed and the floor punctures repaired.

[14] The defendant never inspected the plaintiff's apartment and there is no basis for the defendant's belief that there is no more water leakage through into the plaintiff's roof. The second plaintiff inspected the plaintiff's apartment on 8 September 2007 and confirmed that water continue to leak into the plaintiff's apartment. The illegal extension and structure on the common property reinforced concrete roof slab have not been removed and can be seen from outside the said condominium.

[15] For these reasons the plaintiff, therefore, sought the following orders:

(1) that the defendant shall within 14 days of the order of the court permanently close the unauthorised opening in the wall of the bedroom on the 22nd floor of the adjoining apartment Unit P-PH-05, and stop all unauthorised access to the reinforced concrete roof top slab above the plaintiff's apartment Unit P-PH-07;

(2) that the defendant shall within 14 days of the order of the court remove the unauthorised wooden structures and the metal grill erected on the reinforced concrete roof top slab of the Building P and restore the roof level to its original state.

(3) that the defendant shall within 14 days of the order of the court repair and make good the water proofing to the reinforced concrete roof top slab of the Building P and to ensure that there is no water seepage or leakage from the roof into the plaintiff's apartment Unit P-PH-07 below.

(4) that the defendant shall within 14 days of the order of the court to lock the fire-escape door to prevent any and all unauthorised personnel from having access to the roof level of the Building P; and

(5) that the defendant shall within 14 days of the order of the court, repair, rectify and make good the defects and damage caused to the plaintiff's apartment Unit P-PH-07 by the water seepage or the leakage from the roof level.

[16] It is also to be noted that in this case, the defendant filed a third party proceeding against the residents of the adjoining apartment vide encl 6.

COURT'S OPINION

[17] Based on the submissions and facts presented to me, I am of the view that the third party proceedings brought by the defendant herein are not a triable issue. It is settled law that the defendant's liability towards the plaintiffs need to be proven first by this court.

[18] This is because cl 30(1) of the sale and purchase agreement dated 15 April 2004 (the plaintiff's affidavit, encl 4A) clearly showed that the defendant covenanted and agreed with the plaintiffs that any defects, shrinkage or other faults in the said apartment or in the building or in the common property shall be repaired and made good by the defendant at its own costs and expense within thirty days of the defendant receiving a written notice from the plaintiffs.

[19] In the circumstances and despite several notices of complaints given by the plaintiffs to the defendant, the defendant failed to perform its obligations under the sale and purchase agreement, the deed of mutual covenants and the House Rules.

[20] On the other hand, it is clear that O 16 of the Rules of the High Court 1980 provides the guidelines in cases of third party proceedings, but I am drawn to the principles enunciated in the decision made by the Supreme Court in the case of *Mat Abu bin Man v Medical Superintendent, General Hospital Taiping, Perak & Ors* [1989] 1 MLJ 226 and as well as the decision of the Federal Court in the case of *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657.

[21] I hereby reiterate the above mentioned decisions wherein the Supreme Court held to the effect that:

> We also do not think that a proceeding under O 16 of the Rules of the High Court 1980 is intended to be treated in the same way as an action between a plaintiff and a defendant.
>
> Third party proceedings for contribution should be regarded as independent and separate from proceedings by a plaintiff against a defendant. When a defendant is made liable to the plaintiff, he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. Time should begin to run from the date defendant is held liable.

[22] Meanwhile the Federal Court in its decision held that:

> … third party proceedings are independent proceedings between a defendant as plaintiff and a third party as defendant (*Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 CLJ 137; [1989] 1 MLJ 226 SC). Secondly, the determination of the question in the third party proceedings has to await the determination of the issues in the plaintiff's action against the defendant (See: *Ng Kim Hwa v Ng See Chow & Ors* [1993] 2 MLJ 155). See also summons for third party proceedings (Form 26) which stipulates:
>
> And that the question of the liability of the said third party to indemnify the defendant be tried at the trial of this action, but subsequent thereto.[Emphasis added].
>
> It should also be noted that any statement by a defendant that he is entitled to be indemnified by a third party is no answer to the plaintiff's claim in an O 14 application, unless the third party has discharged the plaintiff's claim (*Thorne v Steel* [1878] WN 215 CA). See *The Supreme Court Practice 1997* Vol 1 para 14/3-4/2 p 156.

[23] Applying the above principles and after considering all relevant considerations, I hereby allow the plaintiff's application in paragraph c wherein the defendant within thirty days from the service of this order to repair and make good the water proofing to the reinforced concrete roof top slab of the Building P and to ensure that there is no water seepage or leakage from the roof top into the plaintiff's said apartment unit below. I also allow paragraph e that the defendant within thirty days from the service of this order to repair and rectify the defects and the damage caused to the plaintiff's said apartment unit by the water seepage or leakage from the roof level. Accordingly, the costs of this application will be borne by the defendant and to be taxed before the registrar on a date which will be fixed later.

Application allowed with costs to be taxed.

Reported by Ashgar Ali Ali Mohamed